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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Washington, D.C.

PRIVATE NATIONAL MORTGAGE ACCEPTANCE COMPANY, LLC ("PENNYMAC") and RICHARD SMIGELSKI, an Individual	CASE 20-CA-170020

REPLY BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S ANSWER TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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Respondent Private National Mortgage Acceptance Company, LLC ("Respondent" or "PennyMac") files this Reply Brief to Counsel for the General Counsel's Answer to Respondent's Exceptions to the Administrative Law Judge's Decision.

INTRODUCTION

As demonstrated by PennyMac in its Exceptions and supporting Brief, the Administrative Law Judge ("ALJ") made three clearly erroneous findings in this case. Specifically, he erred in finding that:

- PennyMac violated Section 8(a)(1) by maintaining its Mutual Arbitration Policy ("MAP") and Employee Agreement to Arbitrate ("EAA") because they purportedly interfered with employees' Section 7 rights to engage in collective and class litigation;
- PennyMac violated Section 8(a)(1) by filing motions in state court to compel Charging Party Richard Smigelski ("Smigelski") to arbitrate claims in his class action lawsuit on an individual basis;
- PennyMac violated Section 8(a)(1) because the MAP allegedly precludes employees from filing charges with NLRB.

The General Counsel's Answering Brief fails to rebut these points. As to whether PennyMac violated the Act by maintaining the MAP/EAA, the ALJ relied upon the Board's decision in Murphy Oil USA, Inc., 361 NLRB No. 72 (2014), enf. den. 808 F.3d 1013 (5th Cir. 2016), cert. granted 137 S. Ct. 809 (January 13, 2017). But the ALJ's reliance on Murphy Oil is misplaced because that decision was denied enforcement by the Fifth Circuit in Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2016). Further, in addition to Murphy Oil, the United States Supreme Court has granted certiorari to review the decisions of the Ninth and Seventh Circuits in Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016), cert. granted 137 S. Ct. 809 (January 13, 2017), and Lewis v. Epic Systems Corp., 823 F.3d 1147 (7th Cir. 2016), cert. granted 137 S. Ct. 809 (January 13, 2017). The Supreme Court's decision to grant certiorari in these cases does not bode well for the General Counsel's position. In all likelihood, the Supreme

Court's decision on this issue will demonstrate that PennyMac did not violate Section 8(a)(1) by purportedly interfering with employees' Section 7 rights to engage in collective and class litigation.

Also, notwithstanding the General Counsel's arguments, it is clear that the Complaint merely alleges that PennyMac violated the Act by petitioning the state court on February 12, 2016 to compel arbitration of Smigelski's claims and later "moving the trial court to reconsider PennyMac's petition to compel" on March 25, 2016. [G.C. Cmplt. ¶¶4-5.] Yet PennyMac's February 12, 2016 petition did not move to compel Smigelski's class action lawsuit. Rather, that motion merely sought to compel arbitration of Smigelski's non-class action claims under the California Private Attorney General Act of 2004, California Labor Code Sections 2698, *et seq.* ("PAGA"). The General Counsel's Complaint did not allege a violation of Section 8(a)(1) for that conduct, and the ALJ erred in finding a violation based on a motion to compel a class action lawsuit.

Finally, the contentions made in the General Counsel's Answering Brief cannot be relied on to sustain the ALJ's finding that PennyMac's "employees would have a reasonable basis for concluding that they would be precluded from filing charges" with the NLRB by the MAP. [ALJD at p. 4, lines 23-25.] The ALJ did not identify any offending language in the MAP to support his Section 8(a)(1) finding. Moreover, the ALJ was incorrect when he rejected the fact that the MAP expressly carves out as an exception to mandatory arbitration for "any claims that could be made to the National Labor Relations Board." [Jt. Ex. H (emphasis added)] Without question, the right to file "any claim" with the NLRB clearly encompasses unfair labor practice charges. Thus, the ALJ's contrary finding completely disregards the MAP's clear and unambiguous language. The ALJ's finding also violates PennyMac's due process rights because the General Counsel's Complaint did not identify any specific provisions in the MAP that could be reasonably read to restrict employees' rights to file charges with the NLRB. While the General Counsel attacks PennyMac's due process claim, the General Counsel does so with unsupported and unsubstantiated assertions.

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LEGAL ARGUMENT

I. THE MAP AND EAA DO NOT VIOLATE SECTION 8(A)(1) DESPITE THE ALJ'S ERRONEOUS FINDING ON THAT ISSUE.

The ALJ found that PennyMac violated Section 8(a)(1) by maintaining the MAP[1] because employees waived the right to "bring class actions or to act concertedly in regard to their terms and conditions of employment," and "initiate lawsuits regarding terms and conditions of their employment." [ALJD at p. 4, lines 14-16 and lines 44-45.]

For the reasons set forth in Respondent's Brief in support of Exceptions, this finding should be rejected. PennyMac does not intend to address the General Counsel's arguments in his Answering Brief that this Section 8(a)(1) finding by the ALJ was based on the Board's decision in Murphy Oil and that the ALJ was bound by that decision. The ALJ's Section 8(a)(1) finding, however, depends on the continued validity of the Board's decision in Murphy Oil.

As noted above, the Supreme Court has granted certiorari to review the Fifth Circuit's decision in Murphy Oil and the decisions of the Ninth and Seventh Circuit in Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016), cert. granted 137 S. Ct. 809 (January 13, 2017), and Lewis v. Epic Systems Corp., 823 F.3d 1147 (7th Cir. 2016), cert. granted 137 S. Ct. 809 (January 13, 2017). The Supreme Court's decision in the above cases will decide whether the Board correctly decided Murphy Oil and, as a result, whether the ALJ correctly found that PennyMac's MAP violates Section 8(a)(1) because it contains a class action waiver. PennyMac is confident that the Supreme Court will affirm the Fifth Circuit's decision and reject the Board's decision in Murphy Oil.

II. RESPONDENT DID NOT VIOLATE SECTION 8(A)(1) BY SEEKING TO COMPEL ARBITRATION OF THE CHARGING PARTY'S STATE COURT CLAIMS.

For the reasons set forth in PennyMac's Brief in support of Exceptions, the ALJ's finding that PennyMac violated Section 8(a)(1) by seeking to compel arbitration of Smigelski's state court claims should be rejected. In his Answering Brief, the General Counsel completely ignores

[1] Unless otherwise stated, references to the "MAP" will refer to both the MAP and the Employee Agreement to Arbitrate.

PennyMac's arguments, thereby tacitly omitting that they are correct.

As demonstrated by PennyMac, the General Counsel's Complaint focused on: (1) PennyMac's filing a Petition to Compel Arbitration and Stay Action on February 12, 2016, and (2) its "moving the trial court to reconsider PennyMac's petition to compel" on March 25, 2016. [G.C. Cmplt. ¶¶4-5.] Here, the stipulated record reflects that, on November 17, 2015, Smigelski filed a Complaint in the Sacramento Superior Court, framing his claims as arising solely under the Private Attorney General Act of 2004 ("PAGA").[2] Smigelski's Complaint did not allege or seek a putative class action. Instead, the state court Complaint sought only civil penalties under PAGA, based on alleged violations of the Labor Code. [Joint Ex. J, pp. 4-5.] On February 12, 2016, PennyMac filed a Petition to Compel Arbitration on the basis that Smigelski's EAA required arbitration of all "wage or overtime claims or other claims under the Labor Code." [Joint Ex. L, p. 2.] Thereafter, on March 3, 2016 the Superior Court issued an order denying PennyMac's Petition to Compel Arbitration of the claims alleged by Smigelski in his state court Complaint. [Joint Ex. R.] On March 25, 2016, PennyMac moved for reconsideration of that order. [Joint Ex. V.] The General Counsel's Complaint alleged only that the foregoing litigation conduct violated Section 8(a)(1), and did not allege that any other conduct of PennyMac violated Section 8(a)(1). [G.C. Cmplt., ¶¶ 4-5.]

In seeking to compel arbitration of Smigelski's PAGA Complaint, PennyMac did not move to enforce any class action waiver because a PAGA action is not a class action. Arias v. Superior Court, 46 Cal.4th 969 (2009). As noted in PennyMac's Brief in support of Exceptions, a PAGA action is a "type of qui tam action." Iskanian v. CLS Transportation Los Angeles, LLC, 59 Cal.4th 348, 382 (2014). Because the General Counsel's Complaint did not allege a Section 8(a)(1) violation on the basis of PennyMac's motion to compel Smigelski's *PAGA action*, the ALJ erred in finding a Section 8(a)(1) violation on the basis of this conduct. In any event, whether PennyMac violated Section 8(a)(1) as found by the ALJ will be resolved, as noted above, by the Supreme Court when it decides the petitions for certiorari in Murphy Oil, Morris v. Ernst

[2] Labor Code Section 2698, *et seq.*

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& Young, and Lewis v. Epic Systems Corp.

III. THE ALJ ERRED IN FINDING THAT EMPLOYEES COULD REASONABLY CONCLUDE THAT THE MAP PROHIBITS FILING CHARGES WITH THE NLRB.

As set forth in PennyMac's Brief in support of Exceptions, the General Counsel's Complaint in Paragraph 3(c) alleged that the MAP and EAA violated Section 8(a)(1) because they could reasonably be read to interfere with an employee's right to file charges with the Board. The ALJ erroneously found a Section 8(a)(1) violation based on this allegation, concluding that the language in the MAP interferes with employees' rights to file charges with the NLRB. [ALJD at p. 3, lines 23-30.] The General Counsel's arguments in support of this ALJ finding should be rejected.

The ALJ's finding violates PennyMac's due process rights for the reasons set forth in PennyMac's Brief in support of Exceptions. While the General Counsel contends otherwise, the arguments set forth in the General Counsel's Answering Brief rely on assertions not based on any support in the record in this matter. Aside from the foregoing, an employee would not reasonably conclude that the language in the MAP prohibits or restricts his or her right to file unfair labor practice charges with the Board. The MAP clearly informs employees of their right to file charges with the NLRB notwithstanding their agreement to arbitrate claims.

A. The ALJ's Finding Violates PennyMac's Due Process Rights.

As noted in PennyMac's Brief in support of Exceptions, the ALJ's finding violates PennyMac's due process rights. Here, the General Counsel's arguments responding to PennyMac's contentions misrepresents and distorts the record in this matter.

In this regard, the General Counsel makes various assertions, but does not cite to anything in the record to support them. For example, the General Counsel states, "Respondent sat on its rights and subsequently responded to the purportedly ambiguous allegation citing the specific provision in the MAP." No citation is provided by the General Counsel for the above statement. See General Counsel's Answering Brief, p. 11.

The General Counsel further states that "at no point, during, or after the hearing, did Respondent move for a Bill of Particulars." (General Counsel's Answering Brief, p. 10.) This is

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true, but not because of what is implied in the General Counsel's assertion. Here, there was no hearing because the General Counsel conveniently forgets to state that this matter was before the ALJ on a stipulated record.

The General Counsel also cites the Board's Rules and Regulations in faulting PennyMac for not filing a motion "before the hearing." (General Counsel's Answering Brief, p. 10.) Again, the General Counsel conveniently forgets that there was no hearing in this matter. But, what is more egregious is the General Counsel's omission that this Section 8(a)(1) allegation at issue was raised by motion to the ALJ to amend the complaint which motion was made after the parties had agreed to a stipulated record and submission of issues. See Counsel for the General Counsel's Motion to Amend Complaint dated August 15, 2016. Moreover, PennyMac did not sit on its rights. PennyMac opposed the General Counsel's motion to amend and objected to the amendment on due process grounds. See Opposition of Respondent Private National Mortgage Acceptance Company LLC to the General Counsel's Motion to Amend Complaint dated August 26, 2016. The ALJ never addressed PennyMac's due process argument opposition. While the General Counsel suggests that the ALJ "properly denied" PennyMac's due process arguments, as far as PennyMac is aware, the ALJ simply ignored PennyMac's due process contentions in granting the General Counsel's motion.

B. Employees Could Not Reasonably Conclude That They Were Prohibited From Filing Charges With The NLRB.

An employee would not reasonably conclude that the language in PennyMac's MAP or the EAA prohibits or restricts his or her right to file unfair labor practice charges with the Board. The MAP clearly informs employees of their right to file charges with the NLRB notwithstanding their agreement to arbitrate claims. How the ALJ could find otherwise is unfathomable when even the General Counsel agreed that the MAP "expressly excludes from its mandatory arbitration provisions any claims that could be made to the National Labor Relations Board." [Joint Mot. p. 6, ¶4 (emphasis added).]

Under Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004), the ALJ had to review the plain terms of the MAP without presumption that the MAP improperly interfered with

employee rights. Id. at 646. Likewise, the ALJ had to refrain from reading the MAP as prohibiting interference with employees' rights to file charges with the NLRB simply because it could be read that way. Id. at 647. The ALJ failed to do so by concluding, without any explanation or analysis, that "employees would have a reasonable basis for concluding that they would be precluded from filing charges" with the NLRB by the MAP. [ALJD at p. 4, lines 23-25.]

The MAP does not interfere with employees' right to file charges with the Board. Instead, the MAP explicitly permits employees to file charges with the NLRB because it excludes from its mandatory arbitration provisions "any claims that could be made to the National Labor Relations Board." [Joint Ex. H, p. 1.] This language is sufficiently clear to inform and otherwise assure that employees with no legal training that they retain the right to file a charge with the Board. Accordingly, a reasonable person could not construe the MAP and the EAA as prohibiting the employee from filing charges with the NLRB.

The Board's decision in Lutheran Heritage is premised on the recognition that language which would be understood only by someone with specialized legal knowledge will not render lawful an otherwise illegal rule. Here, however, only a lawyer or person with legal knowledge, like the ALJ here, could read the MAP and reach an interpretation that the MAP could "reasonably" be read by employees to preclude the filing of ULP charges when the MAP says the opposite. How the ALJ reached this conclusion cannot be gleaned from his decision because the ALJ offered no explanation or analysis. Because of this omission, the General Counsel offers post hoc reasons why the ALJ reached the conclusion he did. However, the contentions made by the General Counsel in his Answering Brief cannot be relied on by the Board to sustain this ALJ's finding. Charlotte Amphitheater Corp. v. NLRB, 82 F.3d 1074, 1080 (D.C. Cir. 1996) ("... [A] court may consider only the Board's own reasons, not the rationalization of counsel (citations omitted).")

The cases cited by the ALJ and the General Counsel in his Answering Brief do not support the ALJ's Section 8(a)(1) finding. For the reasons set forth in PennyMac's Brief in support of Exceptions, the Board's decision in SolarCity Corporation, 363 NLRB No. 83 (2015),

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cited by the ALJ and the General Counsel, does not support the ALJ's finding of a Section 8(a)(1) allegation in this matter. Unlike in Solar City, the language in the MAP expressly excluding any claims that could be made to NLRB is not "buried," and it does not contain any limiting language. Moreover, unlike Solar City, the MAP expressly advises employees that they can and should consult with an attorney before agreeing to its terms: "Because the MAP changes the forum in which you may pursue claims against PennyMac and affects your legal rights, you may wish to review the MAP with an attorney or other advisor of your choice. PennyMac encourages you to do so. [Jt. Ex. H, p.1.]

Likewise, the Board decisions in Bloomingdale's, Inc., 363 NLRB No. 172 (2016), Ralph's Grocery Co., 363 NLRB No. 128 (2016), and Lincoln Eastern Management, 364 NLRB No. 16 (2016), cited by the General Counsel in his Answering Brief, do not support the ALJ's Section 8(a)(1) finding. In citing the above cases, the General Counsel ignores the very different factual settings underlying the Board's holding that the arbitration agreements at issue in those cases which excluded claims under the Act were unlawful.

In Bloomingdale's, the Board found that a statement in a 17-page plan document excluding claims under the NLRA from arbitration was insufficient. The Board did so because a conflict between the plan document, a 12-page brochure and an acknowledgment form created an ambiguity where the brochure and the acknowledgment form did not expressly state that NLRA claims were not subject to mandatory arbitration.

In Ralph's Grocery, the Board found a violation based on a similar rationale set forth in Bloomingdale's. Specifically, the Board found a violation where the employer's arbitration policy permitted Board charges, but the employment application that referenced the arbitration policy omitted any reference to the right of employees to file such charges. Moreover, unlike this case, the arbitration policy in Ralph's Grocery permitted the filing of NLRB charges only where necessary to satisfy "applicable statutory conditions precedent or jurisdictional prerequisites." Ralph's Grocery, supra, 363 NLRB No. 128, slip op. at 2. Because such additional language reasonably conveyed that all employment-related claims ultimately would still have to be resolved only through arbitration, and not by the Board, the Board found a violation of Section

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8(a)(1) notwithstanding the purported NLRB exclusion in the employer's policy. See Adecco USA, Inc., 364 NLRB No. 9 (2016), citing Ralph's Grocery, supra.

Lincoln Eastern Management is also likewise distinguishable from the instant case. In Lincoln Eastern Management, the Board found a violation because language that followed the "purported NLRB exclusion" stated that "following the appropriate administrative processes . . . [was] a prerequisite to the filing of any related arbitration" suggesting that it was "futile to file a charge with the Board because all disputes are ultimately resolved through arbitration." No such language is in the MAP.

Here, PennyMac's contention that the MAP does not violate Section 8(a)(1) is supported by the Board's decision in Utility Vault Company, 345 NLRB 79 (2005), and cited by PennyMac in its Brief in support of Exceptions. In Utility Vault, the Board affirmed an ALJ's finding of a Section 8(a)(1) violation where an arbitration agreement stated that "all disputes" and "legal claims" were required to be arbitrated and Board charges were not included in a list of exceptions. Id. at 82 ("Respondent could easily cure this problem by including the right to file charges in the listed exceptions to the DRP or including a notice that an employee has not waived his right to file charges with the NLRB.") Here, the MAP includes Board charges in its list of exceptions.

Based on the foregoing, PennyMac did not violate Section 8(a)(1) as alleged in Paragraph 3(c) of the General Counsel's Complaint and as found by the ALJ. An employee cannot reasonably conclude that the language in PennyMac's MAP prohibits or restricts his or her right to file unfair labor practice charges with the Board, when the MAP says the opposite. Only a lawyer or person with legal knowledge, like the ALJ here, trained to find ambiguities or faults with a document, could read the MAP in the manner the ALJ did. Accordingly, the ALJ's finding that the MAP violates Section 8(a)(1) because the MAP could "reasonably" be read by employees to preclude the filing of ULP charges should be rejected.

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CONCLUSION

Based on the foregoing, its Exceptions and Brief in support of Exceptions, PennyMac respectfully requests that the Board sustain its Exceptions to the ALJ's Decision, vacate and reverse the ALJ's decision, and/or modify the ALJ's findings, conclusions of law and recommended Remedy, recommended Order, and recommended Notice, accordingly.

DATED: March 21, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2017, I caused the foregoing document described as **REPLY BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S ANSWER TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** in Case 20-CA-170020 to be filed via E-Filing.

I hereby also certify that March 21, 2017, I caused the foregoing document to be served by electronically mailing a true copy thereof and by regular U.S. Mail by placing a true copy thereof in a sealed envelope with postage thereon fully pre-paid and addressed as follows:

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